85-1832

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

MITCHELL EDWIN HEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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58 pp

QUESTIONS PRESENTED FOR REVIEW

I

Whether the detention of Petitioner, for purposes of interrogation and identification, violated the holding of Brown v. Texas, 443 U.S. 47 (1979).

II

Whether the non-Mirandized questioning of an individual, resulting in incriminating responses in violation of Rhode Island v. Innis, 446 U.S. 291 (1980), may be utilized to establish probable cause for a warrantless search.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iv
Petition For Writ of Certiorari	1
Opinions Below	2
Jurisdictional Grounds	2
Constitutional Provisions Involved	3
Statement of the Case	4
A. Events of October 11, 1984	4
B. Motion Hearing	13
C. Motion to Reconsider..	15
Reasons for Granting the Writ	16
I. The Detention Of Petitioner Head For Purposes Of Identification Was Clearly In Violation Of The Holding Of The United States Supreme Court In Brown v. Texas	16

II. The Holding Of The Ninth Circuit Overlooks The Non-Mirandized Questioning Of Petitioner, In Violation Of Rhode Island v. Innis, Which Was Utilized To Establish Probable Cause To Search The Vehicle 23

Conclusion 27

Proof of Service 28

Appendix "A" 29

TABLE OF AUTHORITIES

	Page
Cases	
Brown v. Texas, 443 U.S. 47 (1979)	16,17, 18,19, 20,21, 22,
Miranda v. Arizona, 384 U.S. 436 81966)	23,24, 25,26
Rhode Island v. Innis, 446 U.S. 291, at (1980)	23,25, 26
United States v. Brown, 730 F.2d 1059, (9th Cir. 1983)	26
Wong Sun v. United States, 371 U.S. 471 (1963)	27
Statutes	
Title 21 United States Code Section 881(a)(2)	16
Title 28, United States Code Section 1254(1)	2
Miscellaneous	
United States Constitution, Fourth Amendment	3,17, 19,22
United States Constitution, Fifth Amendment	3

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Mitchell Edwin Head, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 4, 1986.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its Opinion, reversing the Suppression Order entered by the United States District Court for the Southern District of California, on March 4, 1986. A copy of the Opinion is attached as Appendix "A".

JURISDICTIONAL GROUNDS

On March 4, 1986, the Court of Appeals for the Ninth Circuit entered an Opinion reversing the ruling of the United States District Court for the Southern District of California, which had ordered evidence suppressed in the cause at bar.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitition, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation ...

United States Constitution, Fifth Amendment:

> No person ... shall be compelled in any criminal case to be a witness against himself ...

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I

STATEMENT OF THE CASE

A. Events of October 11, 1984

On October 11, 1984, at approximately 10:50 a.m., Drug Enforcement Administration (DEA) Agent Ron D'Ulisse and California State Bureau of Narcotics Enforcement (BNE) Agent David Torres were driving by RJM Laboratories, Santee, California, in their undercover Mercedes Benz.[1] Agent D'Ulisse was aware that RJM, along with two other chemical companies in Southern California, sold ephedrine. Ephedrine can be utilized in the manafacture of methamphetamine, as well as numerous other legal compounds. RJM Laboratories had sold

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1/ RJM Laboratories is a chemical supply house located in Santee, California and Los Angeles.

approximately six thousand nine hundred fifty three (6,953) pounds of ephedrine during the previous two (2) years; the owner of RJM Laboratories had been convicted of "operating a clandestine laboratory" in Los Angeles in 1978.

While driving by RJM Laboratory, the agents saw two (2) people, one of whom was Petitioner MITCHELL HEAD, loading boxes into a late model white Chevrolet Suburban. As the agents turned their vehicle around, and made a second pass by RJM Laboratory, the Chevrolet Suburban was being driven away by Petitioner HEAD. The agents noticed on a rear window of the vehicle a sticker that read "Cal-Trans Emergency Vehicle Hazard Spill Team." The agents did not notice any other markings on the vehicle that would

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indicate it was an emergency vehicle.[2] Agents D'Ulisse and Torres followed the Chevrolet for approximately one and one-half blocks at which time it entered a 7-Eleven Store parking lot and parked.[3] The agents parked their vehicle immediately next to the Chevrolet and

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2/ At the Evidentiary Motion Hearing, it was stipulated by the United States that the above-mentioned sticker on the rear window of Petitioner's vehicle was issued to the Petitioner by Mark Roser, President of Petroleum Industrial Cleaning, Inc., Bakersfield, California for the purpose of allowing the Petitioner access "to and from any spill area P.I.C. is contacted to clean or attend." This sticker was issued to the Petitioner by P.I.C. to allow Petitioner to document photographically spill cleanups by P.I.C.

3/ Agent D'Ulisse testified that at the time the agents were following the Chevrolet they did not know what they were going to do with regard to the vehicle; once it parked in the 7-Eleven parking lot, Agent D'Ulisse decided to "see what we can see inside of the vehicle."

observed Petitioner HEAD get out of his vehicle, use a pay telephone located outside of the store, and then enter the 7-Eleven. After approximately five (5) minutes Petitioner exited the 7-Seven Store, drinking a container of orange juice. As Petitioner HEAD walked back to his vehicle, Agents D'Ulisse and Torres stoped him for questioning. The agents positioned themselves between the Petitioner and his vehicle.

Agent D'Ulisse identified himself as a DEA agent and told Petitioner he "would like to ask him some questions." Petitioner did not respond. Agent D'Ulisse asked Mr. HEAD what he had in his vehicle; Petitioner stated he had solvents. Agent D'Ulisse asked what type of solvents; Petitioner stated he had ether and acetone. Agent D'Ulisse asked what Mr. HEAD was going to use the ether and acetone for; Petitioner

responded he was using the solvents for organics. Agent D'Ulisse asked what he meant by organics; Mr. HEAD responded he was experimenting with butyrophenones.

At this point, BNE Agent Torres took over the questioning. Agent Torres asked Mr. HEAD if he was an employee of Cal-Trans, to which the Petitioner responded he was not. The Petitioner explained to the agents that he occasionally assisted with the cleanup and photographing of hazardous spills on a free-lance basis and he was in possession of the sticker on his vehicle so he could get into hazardous spill areas.

At this point, Agent D'Ulisse required Petitioner HEAD to identify himself with a driver's license. Petitioner went to his vehicle, accompanied by Agent D'Ulisse, to obtain his license. Petitioner removed his driver's license from his

vehicle, showed it to Agent D'Ulisse, at which time Agent D'Ulisse took possession of it.

After taking possession of the license, Agent D'Ulisse noticed that Petitioner resided in "Pismo Beach or Shell Beach, California." He asked Petitioner why he had travelled to the San Diego area to buy ether and acetone. Mr. HEAD explained that he was staying with his girlfriend in Ramona and had decided to pick up the chemicals while in the area. Agent D'Ulisse asked for the girlfriend's telephone number and address and Petitioner stated he could not recall either. Agent D'Ulisse then asked Petitioner HEAD if he had any ephedrine in his vehicle; Petitioner replied "No." Agent D'Ulisse then decided to look into Petitioner's vehicle. Because the tinted windows were reflective, it was impossible for

Agent D'Ulisse to look inside the vehicle while merely standing next to it. Agent D'Ulisse placed his had on top of his head, pressed his hand up against one of the rear windows, and looked inside the van. Agent D'Ulisse testified he could see a box with a label "L-Ephedrine" on it.[4] Upon observing a box with a label "L-Ephedrine" on it, Agent D'Ulisse

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4/ Private investigator George Schmalhofer, previously a Special Agent with the United States Secret Service, testified that he attempted to read an identically labeled box placed in the same location in Petitioner's vehicle from the same window through which Agent D'Ulisse claimed to have observed the labeled box. Investigator Schmalhofer was unable to look into the window without actually cupping his hands on the window because of the reflective nature of the tinted windows. Upon cupping his hands on the window and looking in, he was unable to read the label because of its small size and the darkness within the vehicle. Investigator Schmalhofer has 20-20 vision.

asked if Petitioner was sure he did not have ephedrine to which Petitioner replied he did not. Agent D'Ulisse then took Mr. HEAD's driver's license over to his vehicle and ran a warrant check. (There were no outstanding warrants.) While waiting for a response to his warrant check, Agent D'Ulisse called the Assistant United States Attorney's Office in San Diego and spoke with Assistant U.S. Attorney John Houston. Assistant U.S. Attorney Houston told Agent D'Ulisse not to arrest the Petitioner, but to seize the chemicals. Agent D'Ulisse then explained to the Petitioner that he wanted to arrest him but the Assistant U.S. Attorney had not authorized it.

Petitioner HEAD objected to Agent D'Ulisse entering his vehicle; Agent D'ULisse told Petitioner if he had a complaint to contact an attorney and file a Complaint against him.

Agent D'Ulisse opened up the side door of Petitioner's vehicle and seized the ephedrine, as well as several other boxes that were in the vehicle. Agent D'Ulisse then patted a canvas bag in the vehicle and "felt something hard." Agent D'Ulisse searched the bag and removed a brown paper bag which contained money. Agent D'Ulisse seized the money. Soon after that, Agent Torres asked Petitioner HEAD if he had any weapons in the vehicle. Petitioner responded yes that he had a gun. Agent Torres removed the gun from the location that Petitioner HEAD had indicated.

Agent D'Ulisse again called the Office of the Assistant United States Attorney and was once again not given authorization to arrest Petitioner HEAD. By this time, sheriff's deputies had arrived on the scene to assist and arrested Petitioner for

possession of a concealed weapon within his vehicle.[5] A Federal Complaint was eventually filed against Petitioner and he surrendered on October 15, 1984.

B. Motion Hearing

At the Evidentiary Suppression Motion of January 7, 1985, in addition to the above-mentioned events of October 11, 1984, the following facts were also determined:

1. The investigation of RJM Laboratories on October 11 was not in any way related to Petitioner HEAD and the agents had never seen Petitioner HEAD prior to October 11;

2. Ephedrine is not a controlled substance;

5/ On January 24, 1985, these charges were dismissed in Municipal Court, El Cajon Judicial District, County of San Diego, by the Office of the District Attorney on Fourth Amendment grounds. Case No. C43407.

3. Ephedrine has not been designated a controlled immediate precursor of methamphetamine by the United States Attorney General;

4. Ephedrine may be sold over the counter and possessed by any individual;

5. Methamphetamine may be produced without using ephedrine;

6. Despite the numerous occasions that agents have surveilled RJM Laboratories, prior to October 11, 1984, no one had ever been stopped on a highway or arrested for purchasing chemicals at RJM Laboratories;

7. It was perfectly legal to purchase and possess all of the chemicals located in the Petitioner's vehicle.

At the conclusion of testimony at the Suppression Hearing, the District Court ruled that "[O]n the facts of this case, as they are before me, I do

not find any probable cause to [support] a search of that automobile, as conducted by these officers." The Court went on to state, "There is no information ... to warrant a search of the automobile." And further stated "[H]ere we have nothing. We don't have the sufficient acts to warrant a reasonable officer to believe that a crime has been committed, or a crime is about to be committed."

C. Motion To Reconsider

The United States moved for a reconsideration of the Suppression Order by the District Court and, on February 25, 1985, the District Court, over Petitioner's objection, allowed the Government to recall DEA Agent D'Ulisse in an attempt to present new facts supporting the search.

At the conclusion of Agent D'Ulisse's testimony, the District Court informed the Assistant United

States Attorney that "You haven't added anything to the record that was presented (at the initial hearing)." In response to the Government attorney's attempt to support the search under Title 21 U.S.C. §881(a)(2), the Court responded, "I'm ruling that he didn't have probable cause to search that vehicle ... under any theory."

II

REASONS FOR GRANTING THE WRIT

I

THE DETENTION OF PETITIONER HEAD FOR PURPOSES OF IDENTIFICATION WAS CLEARLY IN VIOLATION OF THE HOLDING OF THE UNITED STATES SUPREME COURT IN BROWN V. TEXAS

The holding of the Ninth Circuit that Petitioner was not detained prior to the inspection of his vehicle contradicts the holding and rationale

of the United States Supreme Court in Brown v. Texas, 443 U.S. 47 (1979).

The Ninth Circuit regarded the initial contact between the Narcotic Task Force agents and Petitioner in the parking lot to be "a consentual conversation that HEAD could have terminated with impunity at any time." The Ninth Circuit further noted that it was not a seizure "in the constitutional sense or as a matter of common sense." The Ninth Circuit Court went on to note that Petitioner's reliance on Brown v. Texas was not persuasive in that "the facts here are significantly different." Although it was not specifically stated, it would appear from the Opinion that the Ninth Circuit did not deem a Fourth Amendment detention to take place until the officers actually looked into the interior of Petitioner's

vehicle, following the seizure of his driver's license and further questioning.

Petitioner respectfully submits that the Ninth Circuit has misconstrued the rationale and holding of Brown v. Texas, 443 U.S. 47 (1979).

As Agent D'Ulisse testified at the suppression hearing, at the time the agents began following Petitioner from RJM Laboratories they did not know what they were going to do with regard to Petitioner or his vehicle. However, once Petitioner entered the 7-11 Store parking lot, the purpose of the detention of Petitioner crystalized in Agent D'Ulisse's mind. According to his own testimony, the purpose of stopping and questioning Petitioner HEAD was "to find out who he was; where he was coming from; what he had in the vehicle." Assuming that

RJM Laboratories is deemed a "high crime" laboratory, the officers detained Petitioner, leaving those premises, for the purpose of determining his identity, where he had come from and what he had in his vehicle. This is the exact same type of detention and questioning which was deemed a "seizure", requiring a "reasonable suspicion" in Brown v. Texas, 443 U.S. 47 (1979).

As the Supreme Court noted in Brown, supra:

> When the officers detained Appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. Id. at 50.

The Court further noted that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person, (citations omitted) and the Fourth Amendment requires that the

seizure be 'reasonable.'" Id. at 50. Reasonableness requires "the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Id. at 51.

In Brown, the Supreme Court held that the detention for identification purposes of an individual, in a high crime area, who appeared suspicious, violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe Brown was engaged or had engaged in criminal conduct. Id. at 53.

There is absolutely nothing to distinguish the facts in Brown v. Texas from the facts in the cause at bar. In this cause, the detaining agents had confronted and stopped Petitioner HEAD on the way to his vehicle in order to determine his identification, where he had come from

and what he had in his vehicle. After brief questioning, which resulted in nothing incriminating or suspicious, the agents then seized Petitioner's driver's license. The purpose of the detention of Petitioner was much broader than the mere identification detention which was performed in Brown. The agents in this cause not only wanted to determine Petitioner's identity, but also his explanation for what he had been doing and the nature of the contents of his vehicle. It was obviously the intention of the officers not to allow Petitioner to leave prior to determining the answers to these questions and it was quite obvious that Petitioner did not feel free to leave when confronted by the officers, questioned and was then required to turn over his driver's license. It would have required a violation of law for Petitioner to

leave in his vehicle at that point in time, without his license.

Prior to the visual inspection of Petitioner's vehicle, and the determination that it may contain a box of ephedrine, Petitioner had clearly been "seized" under the rationale of Brown v. Texas. Prior to the determination that a box of ephedrine may have been in Petitioner's vehicle, there were absolutely no facts which would allow a valid Fourth Amendment detention, based upon reasonable suspicion, of Petitioner.

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II

THE HOLDING OF THE NINTH CIRCUIT OVERLOOKS THE NON-MIRANDIZED QUESTIONING OF PETITIONER, IN VIOLATION OF RHODE ISLAND V. INNIS, WHICH WAS UTILIZED TO ESTABLISH PROBABLE CAUSE TO SEARCH THE VEHICLE

It is clear from the testimony elicited at the suppression hearing, and the facts recited by the Ninth Circuit in its Opinion, that at no time were Miranda warnings provided to Petitioner during his questioning by the Narcotics Task Force agents. During this questioning, Agent D'Ulisse, who had been investigating RJM Laboratories, was of the opinion that anyone who purchased ephedrine at RJM Laboratories was involved in criminal activity. He went to great lengths to establish a basis for this

opinion at the Evidentiary Hearing and in his Affidavit submitted at said hearing. Based on Agent D'Ulisse's testimony and Affidavit, it is clear that any affirmative response to D'Ulisse's question whether Petitioner had ephedrine in his vehicle would be incriminatory.

Agent D'Ulisse questioned Petitioner twice, during his detention, with regard to his possession of ephedrine. After Petitioner had responded he did not have ephedrine, Agent D'Ulisse looked into the vehicle and observed what he believed to be a box of ephedrine. Agent D'Ulisse again questioned Petitioner, who again responded he did not have ephedrine. Neither of these questions, posed after Petitioner had been detained, and his driver's license seized, which were designed to elicit incriminating respones, were preceeded by Miranda warnings.

In Rhode Island v. Innis, 446 U.S. 291, at 300-301 (1980), the Supreme Court stated:

> We conclude that Miranda safeguards come into play whenever a person in custody is subject to either express questioning or its functional equivalent. This is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

The Court also noted that:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 298. (Emphasis supplied)

In this cause, Petitioner had been detained and his freedom of action clearly was deprived in a significant way when his driver's license had been

seized. The agents then continued to question Petitioner which regard to ephedrine with hopes of eliciting an incriminating response, absent Miranda warnings. See Miranda v. Arizona, 384 U.S. 436 (1966). This questioning was in violation of Rhode Island v. Innis, supra, and the Ninth Circuit holding in United States v. Brown, 730 F.2d 1059 (9th Cir. 1983). This issue was not addressed by the Ninth Circuit in its Opinion and is extremely critical to the correct resolution of the issues in this cause.

The illegal questioning of Petitioner which regard to ephedrine was invalid and the responses are inadmissible. Absent the questioning regarding ephedrine, there is absolutely no probable cause to believe Petitioner was involved in any criminal activity.

The subsequent warrantless search of Petitioner's van was the fruit of the illegal questioning, and all evidence obtained pursuant to said search must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

For the above-mentioned reasons, Petitioner prays that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

Respectfully submitted,

FRANK T. VECCHIONE
Attorney for MITCHELL EDWIN HEAD

PROOF OF SERVICE

I, BONNIE WHITEHALL, do hereby state:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California, 92101.

On May 5, 1986, I placed in an envelope, with postage prepaid, a copy of: PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT addressed to the following individuals:

The Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and thereafter placed same in the United States mail at San Diego, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 5th day of May, 1986, at San Diego, California.

BONNIE WHITEHALL

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
MITCHELL EDWIN HEAD,	)
	)
Defendant-Appellee,	)
	)
	)

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DATED: March 4, 1986

Court of Appeals No. 85-5032
District Court No. 84-0939-HBT

Appeal form the United States District Court for the Southern District of California

Howard B. Turrentine, District Judge, Presiding

Argued and Submitted November 5, 1985
San Diego, California

Before: BROWNING, WIGGINS and BRUNETTI, Circuit Judges

Head was indicted for attempted manufacture of methamphetamine (Court I), attempted possession of amphetamines with

APPENDIX "A"

intent to distribute (Count II), and certain other charges that are not pertinent to the present appeal. The district court granted his motion to suppress evidence of chemicals and other objects seized by an agent of the Drug Enforcement Administration under authority of 21 U.S.C. § 881(a)(2).[1] The United States appeals the suppression order. 18 U.S.C. § 3731. We therefore restrict ourselves to the government's claim, on appeal, that the suppression

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1/ 21 U.S.C. §881(a)(2) states:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . . .
>
> (2) The raw materials, products, and equipment of any kind which are used or intended for use, in manufacturing, comopounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

was erroneous and that there was sufficient legal cause for the seizure under section 881(a)(2). In doing so, we address two main issues. The first issue is whether probable cause existed to justify the search of Head's vehicle without a warrant. California v. Carney, 105 S.Ct. 2066, 2068-71 (1985). The government contends that there was probable cause to search Head's vehicle and that his rights under the Fourth Amendment were therefore not violated. Head raises the second issue in his defense of the suppression order. He contends that even if probable cause existed, evidence gained as the result of the search must nevertheless be suppressed because it was tainted by his unlawful detention or arrest.

The critical facts necessary to resolve these issues are not in dispute and our standard of review under the circumstances is de novo. United States

BEST AVAILA

v. Ortiz, 422, U.S. 891, 896-97, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975).

FACTS

On October 11, 1984, DEA Agent D'Ulisse, an agent with nearly 15 years' investigative experience, and with substantial experience with illicit drug laboratories, was working with Agent Torres, a California narcotics officer, in surveillance of RJM Laboratories in Santee, California. D'Ulisse knew that the owner of RJM had been convicted of operating a clandestine laboratory in Los Angeles in 1978. He also knew that investigation had disclosed that RJM was one of the largest producers of ephedrine in the southwestern states and that it had sold substanatial amounts of ephedrine to laboratories that were producing illicit methamphetamine. D'Ulisse knew that ephedrine which, although it is not a controlled substance

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and can be bought over the counter, is used widely as a precursor of illicit methamphetamine. Other precursors are more expensive, are controlled, and are therefore more difficult to obtain. In his experience, possession of any large amount of ephedrine, by anyone other than a manufacturer of nasal decongestants, was very suspicious. There were no manufacturers of ephedrine-type decongestants in the immediate area.

As the agents approached RJM, they saw two men loading boxes into a late model Chevrolet Suburban (hereafter "the van" or "the vehicle")[2] parked in front of the laboratory. In the past D'Ulisse had been successful in following purchasers of RJM chemicals to illicit

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2/ The Suburban is a hatch-back type vehicle with a rear passenger seat that may be removed to provide a flat bed to provide additional cargo space. Throughout the record it is referred to as a "van" and we will hereafter so refer to it.

laboratories. The officers decided to follow the van. As it pulled away from RJM the officers noticed a sticker on it stating that it was a state emergency vehicle, but it had no official State license plates, insignia, or emergency lights.

The agents had no intent to stop the vehicle and, indeed, they did not stop it. Appellee Head, who had beeen driving the van, parked in a public parking lot in front of a 7-Eleven store and enterd the store. The officers parked a few parking spaces away and got out of their car. When Head emerged from the store they met him as he walked toward the van. They identified themselves, asked if he would answer some questions, and he did not object. They asked what he had in the van and he said that he had ether and acetone which he planned to use in experimenting with butyrophenomes. D'Ulisse (whose credentials permitted him

to testify on the subject) said that this was suspicious because, in view of the chemical structure of ether and butyrophenomes, their use together was "ridiculous." Head then disclosed that he was aware of RJM's difficulty with the DEA. He asked if that was why the agents were questioning him; they said it was not. They then asked Head if he was employed by the state and he said that he was not, but that he put the sticker on his van because he occasionally did free-lance work cleaning up hazardous waste spills. He was requested to produce official State identification and he was unable to do so.

D'Ulisse asked to see Head's driver's license. He obtained it from the van and gave it to the officer. It indicated that Head lived near San Luis Obispo, some 250 miles away. Head stated that he was visiting his girl friend who lived in Ramona and thus it was convenient for him

to buy the chemicals at RJM. He could not, however, remember the address or phone number of his girl friend. D'Ulisse then asked Head if he had any ephedrine in the vehicle and Head denied it.

The windows of Head's van were coated with some substance which darkened the glass making it difficult, but not impossible, to see into the interior. To a casual observer, objects within the van could be identified only by their general outline or shape. However, notwithstanding the coating material on the windows, it was possible for the officer to view the interior by placing his face against the glass, and cupping his hands around his eyes so as to exclude the glare from exterior lights. This is the manner in which Agent D'Ulisse looked through the window and into the interior of the van.

When he did so, he saw a box marked "L-Ephedrine" and, from past experience,

estimated it to be a five-pound box, or an amount capable of producing from 90,000 to 180,000 doses when use for decongestants. He saw no label indicating usage for human consumption. Again D'Ulisse asked Head if he had any ephedrine in the van. Because of his observations, he concluded that Head was lying when Head again denied having any ephedrine. D'Ulisse then called an assistant U.S. Attorney, who advised him not to arrest Head, but to seize the chemicals.

At this point, the officers opened the door to the van, over Head's objection, and seized two five-pound boxes of ephedrine. They also noticed a nylon bag, felt something hard, and opened it to see if other chemicals or weapons were present. They found a paper bag inside with nearly $39,000 in it, stacked one face up, one face down, etc.,

in a manner known by D'Ulisse to be commonly used by drug traffickers. Another bag contained $8,000 and two guns. D'Ulisse again called the assistant U.S. Attorney, who continued to advise D'Ulisse not to arrest Head but merely to seize the chemicals. Head was not arrested at that time, but later in the day he was arrested by state authorities for possession of a concealed weapon. At some later date he was indicated on the federal charges.

DISCUSSION

The government's position on appeal is straightforward: the trial court erred in suppressing the drugs because their seizure was supported by probable cause and hence was lawful. Head defends the trial court's suppression order by advancing two principal arguments: (1) The seizure was illegal because it was the product of his ilegal arrest; and (2)

the seizure of the drugs was the consequence of an illegal search. In particular, he contends that the viewing of the drugs through the window of his van was itself an illegal search and information procured as a result of that search cannot provide justification for a warrantless entry into the van.

We discuss Head's contentions first. After doing so, our decision with respect to the government's position will be evident.

1. The Legality of Head's Detention.

Not every encounter between a police officer and a citizen involves a constitutional question. The Constitition only forbids unreasonable searches and seizures. Not every encounter is a seizure; and not every seizure is unreasonable.

Here, we regard the initial conversation between the officers and head in the parking lot of the 7-

Eleven store to be just that--a consentual conversation that Head could have terminated with impunity at any time. It was not a seizure in the constitutional sense or as a matter of common sense.

The information which Head volunteered during that conversation, however, had legal significance. It added to the already considerable fund of knowledge possessed by the agents. Most particularly, it permitted them to gain a reasonable suspicion, grounded in specific and articulable facts, that Head had no legitimate business purpose in picking up drugs from RJM Laboratories. It created the very kind of suspicious circumstance that prudent officers should investigate further and which is condoned by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968).

We conclude that before the officers detained Head and thereafter inspected the interior of the van, or entered it, the officers had sufficient founded suspicion, under Terry, to detain Head against his will for a brief period so as to allay or confirm their reasonable suspicions. At thi point, however, they did not have probable cause to search the van.

The detention of a suspect under Terry v. Ohio is a Fourth Amendment seizure of the suspect's person, Id. at 16, but does not involve all of the liberty restraints incidental to an arrest. The suspect is not incarcerated; he is detained briefly. His liberty is not restrained for all purposes; rather his freedom of movement is restricted only to the extent necessary to permit officers to conduct a preliminary investigation of

suspicious circumstances. Such a limitation upon one's liberty is lawful and evidence obtained during a Terry investigation is likewise lawful. Id. at 30. Here, the officers requested and received Head's driver's license. We hold that it was proper for them to do so so as to identify their suspect. The officers also asked the suspect whether he posssessed ephedrine in his vehicle. After the suspect denied possessing the drug, the officers looked into the interior of the van through the darkened window.

Appellee's reliance on Brown v. Texas, 443 U.S. 47, 49 (1979), is not persuasive. There the officers saw two men in a high crime area. They allowed one to leave but stopped the other an ordered him to identify himself and explain his presence, merely because he "looked suspicious"

and had not been oboserved in the area before. Brown was clearly not in a position to leave if he wished to. He refused to identify himself and disputed the right of the officers to stop him. He was then frisked and arrested for violating a Texas statute that prohibited refusal to identify oneself when lawfully stopped and requested to do so. The facts here are significantly different.

Before we consider whether the viewing of the evidence through the window was an illegal search, it is evident that the search, lawsuit or not, was not the product of an illegal detention. At the moment the officers inspected the interior of the van, Head was being lawfully detained pursuant to Terry. Looking into the window of his van is not inconsistent with the duty of an investigating officer holding a person temporarily

on founded suspicion. Accordingly, we reject Head's contention that the evidence ultimately seized within his van was the product of an illegal arrest.

B. Probable Cause for the Search.

Head's argument that looking through the window of his van was an unlawful search compels us to examine relevant Fourth Amendment authority involving police officers who have inspected the interior of structures and vehicles they could not physically enter without a warrant. Because these cases will, in different factual settings, test the reasonableness of one's expectation of privacy, it is important to emphasize the factual setting here.

The Suburban is, in effect, private commercial premises to which the public generally was not invited.

It was parked in a public place. It was reasonable to expect members of the public to pass within inches of the van and its windows. The windows themselves were coated with a material which made viewing from the exterior difficult, but not impossible, without placing one's face against the window and blocking the outside light with both hands. It is quite clear that the contents of the van were not visible to a casual passerby, but were visible to an inquisitive police officer pursuing founded suspicion. It is not unreasonable to believe that Mr. Head was quite well aware of this vulnerability to his privacy.

The critical question before us is the propriety of the agents' conduct in inspecting the interior of the van by peering through the van's window. The test is whether Head had an expectation of privacy, and could

justifiably and reasonably rely on that expectation of privacy being respected when he put the ephedrine and the other objects in the van. Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Unless there was that reasonable expectation, there was no search for Fourth Amendment purposes. We have held that a police officer, who is in a place where he has a right to be, it not conducting a search when he looks through car windows. United States v. Orozco, 590 F.2d 789, 792 (9th Cir. 1979), cert denied, prior to filing of amended opinion 439 U.S. 1049 (1978). Citing Katz, this court stated in Orozco:

> The deputies' looking through the windows of a vehicle parked on a public street did not violate appellant's reasonable expectations of privacy; anyone walking past the vehicle could easily have observed the packages of cocaine and heroin.

This is consistent with Texas v. Brown, 460 U.S. 730, 740, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983):

> There is no legitimate expectation of privacy, Katz v. United States ... shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.

See also United States v. Finch, 679 F.2d 1083, 1085 (4th Cir. 1982) (no search to look into windows of camper parked in motel parking lot); People v. Rogers 31 Cal.3d 542, 146 Cal.Rptr. 732, 579 P.2d 1048 (197) (no search to view interior of van parked in municipal parking lot); United States v. Coplen, 541 F.2d 211, 214-15 (9th Cir. 1976), cert denied, 429 U.S. 1073 (1979) (no search to view

interior of aircraft standing in public place). The rule has also been extended to views into residences and businesses by people standing in public places. United States v. Hersh, 464 F.2d 228, 230 (9th Cir.), cert denied, 4099 U.S. 1008 (1972) (no search to peer into window alongside front door); United States v. Martin, 509 F.d 1211, 1214 (9th Cir.), cert denied, 421 U.S. 967 (1975) (officers with neighbor's consent viewing interior of defendant's residence from neighbor's yard did no more than the neighbors might have done); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969), cert denied, 397 U.S. 1012 (1970) (no search to view through partially open motel window); United States v. Ortiz, 603 F.2d 76, 79 (9th Cir. 1979), cert denied, 444 U.S. 1020 (1980) (no search to view into gas station); United States v. Wright, 449

F.2d 1355, 1361 (per curiam) (D.C. Cir. 1971), cert denied, 305 U.S. 947 (1972) (no search to view into garage); United States v. Groomer, 596 F.2d 356, 357-58 (9th Cir. 1979) (no search to view into airplane hangar).

In the cases cited there was no suggestion that the observer did any act in order to increase visibility, e.g., no one pushed aside bushes, or curtains or shades, or removed shutters, or scraped through any covering on the window. The observations were made in the condition created by or allowed by the owners or residents. Similarly, in the case at hand, Agent D'Ulisse did not disturb the van or the van window, he merely leaned closer to the window, which was darkened, shaded his eyes, and looked into it. He did not touch the van or the window, except to rest his hands as he shaded his eyes. This

act alone did not convert his view into a search. See Texas v. Brown, 460 U.S. 7400 (officer changed his position by bending down to obtain a better view of the car's interior). D'Ulisse's action in shading his eyes was less intrusive than the use of an artificial means to illuminate the interior of premises, which courts have condoned. United States v. Wright, supra, (flashlight used to peer through a 9-inch gap in garage doors); United States v. Coplen, supra, (flashlight used to illuminate interior of an aircraft); United States v. Hernandez, 715 F.2d 548, 550 (11th Cir. 1983) (per curiam), cert denied, 465 U.S. 1009 (1984) (spotlight used to illuminate boat deck during nighttime). A decision of the U.S. Supreme Court also approved the use of lights to illuminate the

deck of a boat in nighttime. United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed.2d 1202 (1927). Lee was decided several years before Katz, and thus did not rely on the expectation of privacy test. However, Lee was cited in Katz for the proposition that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

We have no doubt that Head intended to gain some measure of privacy by applying an artificial surface to the windows which made viewing from its exterior difficult. Although he might have prevented all viewing by the installation of curtains, or other materials, he chose not to do so and thereby risked his privacy. He knew, or must have known, that the contents of the van were to some extent exposed to view and he

accepted that risk. In reaching our conclusion, we are mindful that the nature of a privacy interest in some areas of a vehicle operated on a public highway is necessarily diminished. Vehicles are pervasively regulated and subject to appropriate safety inspections. They may be stopped for purposes related to safety and given limited inspections consistent with that purpose, for reasons falling short of probable cause. California v. Carney, 105 S.Ct. at 2069-70. Under such circumstances, there are "reduced expectations of privacy," id., at least in the open interior areas of a vehicle which are not customarily used for sleeping purposes. All of these factors cause us to reject Head's contention that the viewing of the interior of his van was itself an unconstitional search.

Although the viewing itself was not a search, it most certainly provided additional cause for the physical entry into the van which followed. We hold that the officers' determination, as the result of their visual inspection, that the van probably contained a drug commonly used in the manufacture of methamphetamines, when added to their existing suspicions and Head's untruthfulness, constituted probable cause to open the van to inspect its interior and to seize the chemicals and the other items of contraband found therein.

We reverse the trial court's order suppressing the evidence taken from the van, and remand for further proceedings consistent with this disposition.

Supreme Court, U.S.
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No. 85-1832

In the Supreme Court of the United States

OCTOBER TERM, 1985

MITCHELL EDWIN HEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence that law enforcement agents seized from a truck in the course of a warrantless search.

On October 24, 1984, petitioner was charged in an indictment returned in the United States District Court for the Southern District of California with attempted manufacture of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846; attempted possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; making a false statement to a DEA agent, in violation of 18 U.S.C. 1001[1]; and carrying a firearm during the commission of a felony, in violation of 18 U.S.C.

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[1]The trial court dismissed this count.

924(c). Before trial, petitioner moved to suppress chemicals, $47,000 in cash, two guns and other objects that DEA agents seized from a truck that petitioner had loaded at a chemical supply house. On March 5, 1985, the district court suppressed the seized evidence on the ground that the agents did not have probable cause to believe that a crime had been committed. On March 4, 1986, the court of appeals reversed.[2] The court of appeals held that the initial conversation between petitioner and the agents in a parking lot was a consensual conversation that petitioner could have terminated at any time. That conversation, the court held, furnished the agents with reasonable suspicion that petitioner had no legitimate purpose in picking up drugs. Accordingly, the court concluded that the agents acquired probable cause when they looked through a window of the truck, and that petitioner's rights under the Fourth Amendment were not violated when the agents searched the vehicle (Pet. App. 29-53).

Petitioner contends (Pet. 16-27) that he was illegally detained during his initial conversation with the agents in the parking lot and that their subsequent questions should have been preceded by *Miranda* warnings. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[3] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand,

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[2]The petition for a writ of certiorari was due for filing on May 3, 1986. The petition was not filed, however, until May 5, 1986. It was therefore untimely under Rule 20.1 of the Rules of this Court.

[3]It is now almost 18 months since the return of the indictment and over 14 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioner.

petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review of the court of appeals' decision would be premature at this time.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986

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[4]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1986-05